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No. 93-723

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X-CITEMENT VIDEO INC.,
AND RUBIN GOTTESMAN,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER UNITED STATES OF AMERICA

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

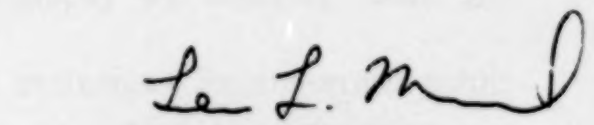
Amicus respectfully moves this Court for leave to file a brief amicus curiae in support of the petitioner, United States. The petitioner has consented in writing to our filing this brief (see Appendix A), but counsel for respondent did not respond to our request for consent.

Amicus has a long-standing interest in and commitment to the governmental effort to eliminate child pornography, and has specific expertise in this area of law (see Interest of the Amicus Curiae, *supra*). NFLF has supporters in all 50 states who are concerned about the effort to protect our children from sexual exploitation. Further, we believe our legal interpretation

of the statute at issue is not represented by either party, or by any other amicus, and will therefore provide a unique perspective to this Court.

For all these reasons, amicus requests that this Court grant our motion for leave to file a brief amicus curiae.

Respectfully submitted,



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INTEREST OF THE AMICUS CURIAE

National Family Legal Foundation (NFLF) is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from illegal pornography and the sexual crimes which invariably accompany its widespread distribution. NFLF provides free legal assistance to prosecutors enforcing child pornography and obscenity laws, and helps draft laws and ordinances for concerned public officials to help lessen the negative influence of pornography on society.

NFLF has appeared as amicus curiae before this Court in every child pornography and obscenity case since NFLF's inception in 1990, including the recent child pornography case of *United States v. Knox*. NFLF

board members Edwin Meese, former Attorney General of the United States, and Alan Sears, former executive director of the Attorney General's Commission on Pornography, have a longstanding commitment to aggressive enforcement of federal child pornography laws.

SUMMARY OF ARGUMENT

Protecting children from sexual exploitation is a governmental interest of surpassing importance. The statute at issue, 18 U.S.C. § 2252, has been employed successfully by federal prosecutors for more than 15 years to prosecute those who traffic in child pornography. The statute has withstood numerous court challenges. But if the Ninth Circuit's decision is correct, § 2252 has suffered all this time from a fatal constitutional defect that no other court was able to discover. We believe strongly that the court of appeals failed to accord Congress the deference it is due by refusing to construe this vital statute in a constitutional manner. The decision of the court of appeals conflicts with decisions of this Court and other federal courts, and most importantly, will cripple the important federal effort

to eliminate child pornography. This Court should therefore reverse the court of appeals and reinstate the convictions of Rubin Gottesman and X-Citement Video.

ARGUMENT

I. The Governmental Interest In Combatting Child Pornography Is Compelling

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as distinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H.Rep.No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 492.

Congress recognized that the distribution and receipt of child pornography contributes to further

incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish contact with other pedophiles, and even to establish liaisons with some of the child models.

S.Rep.No. 438, 95th Cong., 2d Sess., at 5 (1977), reprinted in 1978 U.S. Code Cong. and Admin. News, 43.

This Court recognized the substantial governmental interest in protecting children from the evils of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In an opinion by Justice White, the Court upheld a New York statute which prohibited the distribution of materials which depict children engaging

in sexually explicit conduct whether or not such depictions are "obscene".

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Further, the Court went on to say:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be

> closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759 (footnote omitted). The Court concluded, because of the compelling state interests involved, that child pornography, even though not obscene, was not protected by the First Amendment.

Finally, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court approved a law prohibiting the possession of child pornography, even in one's own home. In upholding the statute, this Court further addressed the impact of this vile crime:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain... [E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use

child pornography to seduce other children into sexual activity.

The victimization of children through child pornography has been aided by two recent developments, one in technology and one in the law. First, advancements in computer technology and graphics have made it possible for pedophiles to instantaneously reproduce and distribute child pornography on a national and international basis through computer modems. Second, the Justice Department's recent reinterpretation of the definition of child pornography in the case of *United States v. Knox*, No. 92-1183, *cert. granted* 113 S.Ct. 2926 (June 7, 1993), *vacated and remanded*, ___ U.S. ___, 62 U.S.L.W. 3318 (Nov. 1, 1993), has opened the door -- if the courts go along -- to legalization of a whole category of child pornography that was previously

prosecutable. In that case, Congress specifically repudiated the Justice Department's new interpretation by a 100-0 Senate vote, but only after this Court remanded the case to be reconsidered in light of the Justice Department's new, weaker standard.

Given the strength of the government's interest in protecting children from sexual exploitation, and given the traditional reluctance of the judiciary to strike down an act of Congress as unconstitutional on its face, the court of appeals erred by failing to construct § 2252 in a constitutional manner. This crippling of the battle against child pornography can only be corrected if this Court reverses the court of appeals.

II. The Government Must Prove, As With Obscenity Laws, "Some Element Of Scienter," But Not Actual Knowledge Of The Material's Legal Status

In *Ferber*, this Court said that "the States are entitled to greater leeway in the regulation of pornographic depictions of children." 458 U.S. at 756. Nevertheless, the Court ruled that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765.

This comparison to obscenity law regarding scienter stands in contrast to this Court's departure from the obscenity standards in formulating the test for child pornography. Unlike obscenity, this Court held that child pornography need not appeal to the prurient interest, need not be depicted in a patently offensive

way, and need not be considered as a whole in order to be placed outside the protection of the First Amendment. 458 U.S. at 764-65.

But in requiring "some element of scienter," this Court cited to obscenity cases that set outer boundaries on both sides of this issue: on one hand, strict liability is not permissible, *Smith v. California*, 361 U.S. 147 (1959), but on the other hand, knowledge of the legal status of the materials is not statutorily or constitutionally required, *Hamling v. United States*, 418 U.S. 87, 123-24 (1974).

The knowledge this Court has approved in obscenity cases is knowledge of the "character and nature of the materials," *Hamling*, 418 U.S. at 123, and "reason to know" or "a belief or ground for belief which warrants further inspection." *Ginsberg v. New York*, 390 U.S.

629, 643-44 (1968). As this Court indicated in *Ferber*, a similar scienter requirement is appropriate in the child pornography context, yet keeping in mind the "greater leeway" given to the government in regulating child pornography.

This standard is similar to the recklessness standard urged by Judge Kozinsky in his dissent below. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, at 1292-1297 (9th Cir. 1993). While it is certainly not strict liability, it is much less stringent than the knowledge requirements suggested by the Ninth Circuit and the government. The Ninth Circuit would require "knowledge that at least one of the performers is under age 18," 982 F.2d at 1291, while the government believes that it should have to prove the defendant "knew [the transported material] depicted minors engaging in

sexually explicit acts." United States' Brief in Support of Petition for Writ of Certiorari, at 10-11.

The problem with both of these proposals is that they require the government to prove too much. Both in essence require the government to prove that the defendant knew the legal status of the material. The court of appeals' says that requiring knowledge that at least one performer was underage is only a requirement of knowledge of a particular fact, not a requirement that the defendant know the material's legal status, in violation of *Hamling*. *X-Citement Video*, 982 F.2d at 1291. But this is doublespeak; if you require actual knowledge that one performer is underage, you are requiring actual knowledge of the material's legal status, because by definition it is then child pornography. *Hamling* made clear that knowledge of the material's

legal status was not necessary. 418 U.S. at 123.

How the obscenity scienter standard as outlined in *Hamling* and *Ginsberg*, applied to child pornography cases, would play out under differing factual circumstances would vary according to those facts. We could be assured, however, that "some element of scienter" that was short of actual knowledge of the material's legal status would be required, and constitutional concerns would be met.

While the effect of the court of appeals' decision is to undercut the important federal effort to eliminate child pornography, as a matter of law the ruling conflicts with previous decisions of this Court and other courts. As Judge Kozinsky pointed out in his dissent, the panel ignored this Court's discussion in *Osborne* of the minimum constitutional scienter requirement for a child

pornography conviction. In that case, this Court held that recklessness is constitutionally sufficient to uphold a child pornography conviction. 495 U.S. at 115. Further, courts have an obligation to determine whether constitutionally narrowing an act of Congress will cure its defect before taking the extreme step of invalidating the statute. *Edward D. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *X-Citement Video*, 982 F.2d at 1295, n.6.

The Ninth Circuit decision striking down § 2252 is not simply in the minority -- it stands alone in its conclusions among all the cases interpreting this statute, whether decided before or after *X-Citement Video*. Those decided since *X-Citement Video* have specifically repudiated its reasoning. See e.g. *United States v.*

Burian, 1994 WL 114645 (5th Cir. April 7, 1994) ("We decline to follow X-Citement and choose instead to follow our earlier decisions and those of our sister circuits interpreting the statute to require actual knowledge or reckless disregard of a performer's minority."); *United States v. Cochran*, 1994 WL 25599 (3d Cir. Feb. 2, 1994); *United States v. Gendron*, 1994 WL 50975 (1st Cir. Feb. 28, 1994); *United States v. Gifford*, 1994 WL 46738 (1st Cir. Feb. 24, 1994); *United States v. Colavito*, 1994 WL 76135 (2d Cir. Jan. 24, 1994, amended and reported Mar. 10, 1994). See also these district court cases decided since *X-Citement Video*: *United States v. Long*, 831 F.Supp. 582, 586 (W.D.Ky. 1993); *United States v. Kempton*, 826 F.Supp. 386, 388-89 (D.Kan. 1993); and *United States v. Prytz*, 822 F.Supp. 311 (D.S.C. 1993).

No other courts, past or present, have struggled so mightily to discover the constitutional defects identified and brought to the forefront by the Ninth Circuit panel decision.

The Ninth Circuit panel should have grafted a constitutional requirement of recklessness onto the statute, thus saving it from facial invalidity. It "demeans the grand conception of the First Amendment", *Miller v. California*, 413 U.S. 15, 34 (1973), to continually use the noble protections for freedom of speech afforded by that historic provision to examine in microscopic fashion the validity of convictions for those engaged in "the sordid business of pandering." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 258 (1990) (Justice Scalia, concurring and dissenting), quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966).

Rubin Gottesman not only was involved in "the sordid business of pandering" sexually explicit and probably obscene material, but the government clearly proved in this case that he had actual knowledge that he was distributing child pornography. United States' Brief in Support of Petition for Writ of Certiorari, at 2-4. But it should be enough to sustain a conviction in this case, and in any subsequent child pornography case, for the government to prove that a defendant recklessly trafficked in child pornography. Any further scienter requirement would decriminalize much child pornography, because every trader in pedophilic material involving postpubescent children would successfully argue that he had no idea how old the "performers" were. This would be a crushing blow to our nation's effort to protect children from sexual exploitation.

CONCLUSION

The bottom line is this: Rubin Gottesman makes his living skirting obscenity laws, and like most pornographers was only too happy to satisfy a request for child pornography when the price was right. To people who make their living through commercial exploitation of the flesh of young girls, whether those girls are 11 and 12 as they were in the *Knox* case, or 15 as in this case, or 18 and 19 as they are in most obscenity cases, doesn't make a whole lot of difference. And if they are reckless about the age of those they abuse and degrade to make a profit, we shouldn't go out of our way to construct legal arguments to let them off the hook. But that is what the Ninth Circuit did in the case. It went so far out of the way that not one other court looking at the same statute ever discovered the same constitutional

problem.

Affirming the constitutional validity of convictions for hard-core pornographers who recklessly disseminate sexual material involving children will never interfere with the legitimate free speech rights of the American people. Nor will imposing minimal scienter requirements on those who would order, receive or possess hard-core pornography because they suspect it includes sexual depictions of children. But while federal judges and the Solicitor General's office play fun and challenging intellectual law school games with statutory and constitutional interpretation, in this case and in *Knox*, the sexual abuse of real children for profit continues. This Court should not allow another roadblock to be thrown up in the effort to prosecute despicable criminals who make their living from the sexual abuse of children.

For all the foregoing reasons, it is vital that this Court reverse the Ninth Circuit and reinstate the convictions of Rubin Gottesman and his corporation, X-Citement Video.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation In Support Of The Petitioner United States" have been sent by U.S. Mail, Postage Prepaid, on this 14th day of April, 1994 to:

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APPENDIX A

Office of the Solicitor General

Washington, D.C. 20530

April 13, 1994

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Re: United States v. X-Citement Video, No. 91-723

Dear Mr. Munsil:

As requested in your letter of April 13, 1994, I hereby consent to the filing of an amicus curiae brief on behalf of the National Family Legal Foundation in the above-captioned case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

BEST AVAILABLE COPY